

May 26 2010

*Ed Smith*  
CLERK OF THE SUPREME COURT  
STATE OF MONTANA

No. DA 10-0238

IN THE SUPREME COURT  
OF THE STATE OF MONTANA

---

GARY HOFF

Plaintiff and Appellee

v.

LAKE COUNTY ABSTRACT &  
TITLE COMPANY, a corporation, Defendant;  
COUNTRYWIDE HOME LOANS, INC.,  
a corporation; DOES I though X inclusive,  
individuals, corporations and partnerships,

Defendant and Appellant

FILED

MAY 26 2010

*Ed Smith*  
CLERK OF THE SUPREME COURT  
STATE OF MONTANA

---

**MOTION OF APPELLEE GARY HOFF TO DISMISS APPEAL  
OR ALTERNATIVELY TO STRIKE FILING OF NOTICE OF APPEAL**

---

COMES NOW, the Appellee Gary Hoff, and hereby moves the Court for an order dismissing this appeal be dismissed without prejudice because a final judgment has not been entered nor are any of the interlocutory orders appealable and thus the Notice of Appeal filed by Appellant Countrywide Home Loans, Inc. ("Countrywide") was filed prematurely. Alternatively, Mr. Hoff requests that the

Court strike the filing of Countrywide's Notice as premature until the District Court enters a final judgment or appealable order.

Counsel for Mr. Hoff has contacted Countrywide's counsel regarding this motion who has indicated that Countrywide opposes this motion. Counsel for Lake County Abstract & Title Company has been contacted and consents to this motion.

### **INTRODUCTION**

Countrywide filed a Notice of Appeal ("Notice") on May 12, 2010 in the Montana Supreme Court. In its Notice, Countrywide appeals six separate orders entered by the District Court.

On April 21, 2010, before Countrywide's Notice was filed, Hoff filed a Motion for Assessment of Costs and Attorneys's Fees with the District Court. Also on April 21, 2010, Hoff submitted to the District Court a proposed default judgment. Hoff's motion has not been decided and the proposed default judgment has not been entered. No final judgment has been entered.

### **BRIEF**

Under Rule 6(1) M. R. App. P. A party may only appeal from a "final judgment" in an action, or from a "final order" specified in sections (2), (3), and (4) of M. R. App. P. 6. A final judgment is one that "conclusively determines the rights of the parties and settles all claims in controversy in an action or proceeding,

including any necessary determination of the amount of costs and attorney fees awarded or sanction imposed." M. R. App. P. 4(1)(a). The orders from which Countrywide appeals are interlocutory orders in that they do not finally decide the action. M. R. App. P. 4(1)(b). There is generally no right to appeal an interlocutory order. M. R. App. P. 6(5)(f). This rule is intended "to prevent fragmentary, premature and unnecessary appeals by permitting the trial court to bring the case to final judgment before it is presented to the appellate courts. *Farmers Union Mutual Insurance Co. v. Bodell*, 2008 MT 363, ¶ 17, 346 Mont. 414, 197 P.3d 913. Orders or judgments which adjudicate fewer than all claims as to all parties in cases involving multiple parties or claims for relief are also not appealable. M. R. App. P. 6(5)(a). In this case, Hoff's claims against Lake County Abstract & Title Company remain to be litigated.

**I. Countrywide's Appeal should be dismissed.**

The District Court has not yet entered a final judgment against Countrywide. The fact that Hoff's motion for costs and attorneys fees remains pending demonstrates that no final judgment has been entered. M. R. App. P. 4(1)(a).

In addition, no appealable "final order" has been entered. M. R. App. Rule 6(3) provides for appeals of certain kinds of orders in civil cases provided the order is one of the type articulated in Rule 6(3)(a) - (k) and also provided the order "is the

court's final decision on the referenced matter."

Because no final judgment has been entered in this case, there are no orders after a final judgment from which to appeal pursuant to Rule 6(3)(a). Rule 6(3)(b) provides for an appeal of a "deemed denied" motion. No motion filed by Countrywide has been deemed denied. Although Countrywide did file a Rule 60(b) motion before the District Court, said motion was explicitly denied by the Court in its Order dated April 13, 2010. It was not "deemed denied" as required by rule. Countrywide's 60(b) motion was not properly before the District Court in the first place because no final judgment or order had been entered from which to make a proper Rule 60(b) motion.

The only remaining subsection of Rule 6(3) that Countrywide may claim is applicable is Rule 6(3)(e) pertaining to the granting or denial of an injunction. Reliance on this rule is misplaced.

Within his motion for default judgment Mr. Hoff also asked for an order enjoining Countrywide from requiring loan payments, undertaking foreclosure or assessing interest or other charges against the loan during the term of the underlying life estate. Although the Court granted Hoff's motion through its Order dated April 13, 2010, the Order did not specifically enter an injunction. The Order was not the Court's "final decision on the matter" as no injunction has been entered.

Because no final judgment or appealable order has been entered, the orders from which Countrywide appeals are interlocutory and are not appealable pursuant to M. R. App. P. 6(5)(f). The Court should dismiss Countrywide's appeal.

## **II. The Court should strike the filing of Countrywide's Notice of Appeal.**

As an alternative to dismissal, the Court is asked to strike the filing of Countrywide's Notice without prejudice, and to order that said Notice shall not be filed until a final judgment or appealable order is entered and all issues concerning the case are resolved including the issue of costs and attorneys fees.

M. R. App. P. 4(5)(a)(ii) provides " ... a notice of appeal filed after the announcement of a decision or order, but before [ ] entry of the written judgment or order from which the appeal is taken . . . shall be treated as filed on the date of such entry." Countrywide filed its Notice on May 12, 2010. The Clerk of the Supreme Court then provided the parties with a Notice of Filing dated May 18, 2010. However, a final judgment has not been entered in this case. The District Court has granted Hoff's motion for default judgment, but has not entered a final judgment or resolved the issue of costs and attorney's fees. Therefore, Countrywide's Notice should not be officially filed until the date that the District Court enters a final

judgment or enters an otherwise final appealable order.

Dated this 25<sup>th</sup> day of May, 2010

WORDEN THANE P.C.  
Attorneys for Appellee/Plaintiff  
Gary Hoff

By: 

Martin S. King

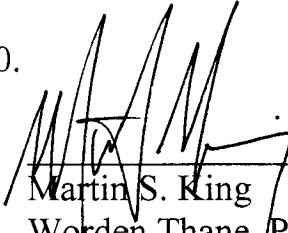
CERTIFICATE OF SERVICE

I hereby certify that I have filed a true and accurate copy of the foregoing Motion with the Clerk of the Montana Supreme Court; and that I have served true and accurate copies of the foregoing Motion upon the Clerk of the District Court, each attorney of record, and each party not represented by an attorney in the above-referenced District Court action, as follows:

Christian T. Nygren  
MILODRAGOVICH, DALE, STEINBRENNER  
& NYGREN, P.C.  
P.O. Box 4947  
Missoula, MT 59806-4947  
Attorneys for Appellant/Defendant  
Countrywide Home Loans, Inc.

John A. Mercer  
Turnage & Mercer, PLLP  
P.O. Box 460  
Polson, MT 59860  
Attorneys for Defendant Lake County  
Abstract & Title Co.

DATED this 25<sup>th</sup> day of May, 2010.

  
\_\_\_\_\_  
Martin S. King  
Worden Thane, P.C.  
P.O. Box 4747  
Missoula, MT 59806